

THE WITHDRAWAL OF LANDS FROM THE TORRENS ACT

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One of the trouble spots in the Torrens Act has been cleared up by the 102nd General Assembly through the enactment of Amended House Bill No. 205. For a number of years there has been considerable confusion as to whether it was possible to withdraw land from the operation of the Act once it had been brought under and made subject to its terms.

When the original Torrens Act was passed in 1913 it contained the following provision:

No land once brought under and made subject to the provisions of this act shall ever be withdrawn therefrom.

This provision became Ohio General Code Section 8572-86, and with slight, non-substantive modification was carried into the Ohio Revised Code as Section 5309.90.

In 1915 a new provision, in the nature of an amendment to Ohio General Code Section 8572-64 (which made optional the registration of title to land sold in partition and other specified proceedings), was enacted. This new provision became Ohio General Code Section 8572-64a, and after setting out rules regarding non-conformity with certain requirements of the law, it contained the following language that has been the basis of the confusion referred to above:

Owner of registered title may cancel same upon surrender of certificate. Any person owning real estate the title to which is registered may surrender his certificate to the county recorder, who shall thereupon cancel said certificate of record, and thereafter said title shall be considered the same as if it had never been registered. All deeds and mortgages heretofore filed conveying registered lands, the registration certificate of which has been surrendered as herein provided for, shall be recorded according to law, and thereafter the lands conveyed therein shall be considered the same as if they had never been registered.

Many attorneys throughout the State interpreted this language to mean that *any* parcel of real estate could be withdrawn from the operation of the Act. Certainly, a reading of the above language, as it stood alone, would lead one to such a conclusion.

Such an interpretation became even more logical following the revision of the Code in 1953. In the revision, the above-quoted portion of Ohio General Code Section 8572-64a, was divorced from that portion

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pertaining to non-conformity with certain requirements of the law, and was set forth in a separate section, Ohio Revised Code Section 5309.68.

During all of these proceedings, Ohio General Code Section 8572-86 (Ohio Revised Code Section 5309.90), prohibiting the withdrawal of lands, was left untouched except for a purely mechanical and non-substantive change that dealt with the new numbering system of the Revised Code. The fact that this section had not been expressly repealed by the Ohio General Assembly should have given sufficient warning to those who felt that land could be withdrawn from the operation of the act, since it is generally recognized that courts do not favor the repeal of an existing statute where express terms indicating that intention are not employed by the legislature.

In 1945, the Ohio Supreme Court, in deciding the case of *State ex rel. Draper v. Wilder*,¹ made the following statement:

Except as provided in Section 8572-64a, General Code, no land once brought under and made subject to the act pertaining to the registration of land titles shall ever be withdrawn therefrom. See Section 8572-86, General Code.

While this statement was merely obiter dictum it showed quite clearly that the Ohio Supreme Court did not look upon the enactment of Section 8572-64a as a repeal, by implication or otherwise, of Section 8572-86.

In the case of *Beplar v. Reardon*,² the First District Court of Appeals in referring to Section 8572-64a, said:

In terms, it authorizes any person owning real estate, the title to which is registered, to surrender his certificate and have the title deregistered. It seems clear to us that this language must be limited to those titles that are registered in partition cases and other sales mentioned in that section. The statute in effect gives to the holder of the title emanating from such proceedings the option of deciding whether he desires a registered or unregistered title.

The Court in rejecting the contention that Section 8572-64a permitted *all* holders of registered titles to surrender their certificates, made it crystal clear that any relief of this nature would require affirmative action by the legislature at some future date.

The legislature has now taken that action. Ohio Revised Code Section 5309.90 has been expressly repealed and Ohio Revised Code Section 5309.68 has been amended to provide the procedure by which land may be withdrawn. The procedure can be summarized as follows:

1. The owner of the real estate should submit to the county recorder an affidavit declaring that it is his intention to

¹ 145 Ohio St. 447, 62 N.E. 2d 156 (1945).

² 92 Ohio App. 70, 109 N.E. 2d 686 (1952).

withdraw his land from the operation of Ohio Revised Code Sections 5309.02 to 5310.21, inclusive. The affidavit must describe the real estate and be properly executed and signed. This affidavit constitutes the owner's request to withdraw and he must attach his duplicate certificate of title to it.

2. The county recorder must cancel the certificate upon order of the court. Perhaps the most advisable way to secure such an order is to file an application with the court reciting the facts contained in the affidavit. The court can then sign an entry ordering the recorder to cancel the certificate. It would undoubtedly be wise to file a certified copy of this entry along with the affidavit, so that a title examiner can readily see that the statutory requirements have been complied with.

The so-called Torrens System is used to varying extents throughout the State of Ohio. It has been, and probably for many years to come, will be the subject of considerable controversy. There are many known instances where property owners have desired to withdraw their land from the system. Unquestionably there have been many other similar desires that have gone unnoticed. The prohibition against withdrawal has very little to be said in its favor and if the confusion that has resulted from the original enactment of Ohio General Code Section 8572-64a, has served to bring this fact to the attention of the legislature, then perhaps it has been worthwhile. At any rate, the 102nd General Assembly has lent a helping hand to property owners who have found themselves in the position of wanting to get "out," and this has been accomplished without doing violence to the system.